

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 6306 of 1995

For Approval and Signature:

Hon'ble MR.JUSTICE K.R.VYAS

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?
1 and 2 Yes, 3 to 5 No.

UNILEC ENGINEERING CO. & 1

Versus

UNION OF INDIA

Appearance:

Mr. K.B.Trivedi, party in person, being appellant
No.2 in person.

Mr. J.,D.Ajmera, Addl Standing Counsel for the Union
of India for the respondents.

CORAM : MR.JUSTICE K.R.VYAS

Date of decision: 17/12/96

ORAL JUDGEMENT

The appellant-plaintiffs have filed the present appeal against the judgment and order dated 28-6-95 passed by the learned City Civil Judge, Court No.22, Ahmedabad in Civil Suit No. 1969 of 1990, whereby the suit filed by the appellants was dismissed.

The first appellant is a proprietary concern and the second appellant is its sole proprietor. In the suit filed by the appellants, number of reliefs were prayed. However, to summarise the same in nutshell, the appellants filed the said suit for a declaration that the respondent-defendants are not entitled to disconnect the telephone connections held by the appellant-plaintiffs and for a direction to restore and/or reconnect the telephones of the appellants.

It is the case of the appellants that they were subscribers of two telephone connections - one at the factory being No. 811585 and another at the residence being No.39514. Telephone No.811585 was disconnected with effect from 25-11-1985 for non-payment of the two bills dated 21-9-1985 for an amount of Rs.125/- and dated 21-3-1986 for an amount of Rs.125/-. The plaintiffs have further averred that even though these bills were paid, the department did not restore the said phone. The appellants informed the department about the payment of these bills vide their letter dated 20-1-1987. It is the case of the appellants that the said telephone remained dead or out of order and was not restored or reconnected even after the payments were made as mentioned in letter dated 20th January, 1987. According to the appellants, appellant No.2 was informed on another telephone No. 347398 on 12-2-90 that the payment of telephone bill in respect of No.812101 is not made. Appellant No.2, in reply to the said telephonic query replied that telephone No.811585 is out of order or in other words was not restored since long and further that the respondents have failed to provide the services and/or to rectify the defect. Since the appellants failed to pay the outstanding bills, the respondents by invoking Rule 443 of the Indian Telegraph Rules, 1951 (hereinafter referred to as "the said Rules") on 15-2-1990 disconnected another telephone No.347398 of the appellants. It is the further case of the appellants that since the respondents have failed to provide services and have not restored their telephone No.811585 (812101), rule 443 of the said Rules was not applicable and the action of disconnecting the residential telephone No.347398 on 15-2-1990 was illegal as there were no outstanding dues in respect of the said telephone inasmuch as the appellants paid up the bill dated 1-1-1990 for Rs.1498/- which included the rent upto 31-3-1990. Not only that but the appellants have also paid another bill dated 1-3-1990 for Rs.1205/covering the rent period upto 31-5-1990. The appellants, therefore, prayed for reconnection of both the telephones stated above.

The respondents vide their written statement, Ex.5, while denying the averments made in the plaint, have, inter alia, contended that as the payment of telephone bill dated 2-9-85 was not made, telephone No.811585 was disconnected. On receipt of the payment, it was ordered to be restored or reconnected vide letter dated 20th January 1987. However, the reconnection could not be carried out as the premises were closed and, therefore, on personal approach of appellant No.2, the telephone was ultimately restored with effect from 2-6-1987. According to the respondents, the telephone number was changed from 811585 to 812101 and that the said telephone, after restoration, was operative till 6-2-89. This telephone was disconnected for non-payment of bills dated 1-11-88 and 11-12-88 and inspite of the reminders made, since the dues were not paid, the respondents disconnected another telephone No.347398 as per rule 443 of the said Rules.

The learned City Civil Judge, as stated above, after appreciating the evidence on record, negatived the contentions of the appellants and dismissed the suit.

Mr.K.B.Trivedi, appellant No.2, has argued this matter in person on behalf of the appellants. Mr. Trivedi, after having taken me through the entire evidence on record, has submitted that telephone No.811585 remained out of order and was not at all restored and, therefore, there was no default on the part of the appellants and consequently the respondents were not entitled to disconnect both the telephones. In the submission of Mr. Trivedi, for the alleged default of non-payment of the dues of telephone No.811585, the respondents were not entitled to disconnect telephone No.347398 for which, admittedly, there was no outstanding dues. Mr. Trivedi also submitted that the disconnection of telephone No.347398 was illegal and in violation of the principles of natural justice since no notice was served on the appellants before effecting the disconnection.

Mr. J.D.Ajmera, learned Additional Standing Counsel for the respondents, on the other hand, while supporting the judgment and order of the City Civil Court, has submitted that in view of section 7B of the Indian Telegraph Act, 1885 (hereinafter referred to as "the said Act"), the appellants were obliged to go before the arbitrator and, therefore, the civil suit filed by them was not maintainable. In support of his submission, Mr. Ajmera has placed reliance on the judgment of a Division Bench of this Court in Govindbhai Premjibhai

Chovatia vs The Chief General Manager, Gujarat Telecom Circle & ors, 1995 (2) G.L.RH.1041.

Before I decide the appeal on merits, it is necessary to decide the preliminary contention of the respondents regarding the maintainability of the suit itself. Section 7B of the said Act deals with arbitration of disputes and it reads as under:

"7B.-(1) Except as otherwise expressly provided in this Act, if any dispute concerning any telegraph line, appliance or apparatus arises between the telegraph authority and the person for whose benefit the line, appliance or apparatus is, or has been, provided, the dispute shall be determined by arbitration and shall, for the purposes of such determination, be referred to an arbitrator appointed by the Central Government either specially for the determination of that dispute or generally for the determination of disputes under this Section.

(2) The award of the arbitrator appointed under sub-section (2) shall be conclusive between the parties to the dispute and shall not be questions in any court."

The Division Bench of this Court, in Govindbhai Chovatia's case (supra), was concerned with the grievance of defect in the meter recording the number of the calls. In an appeal against the decision of the learned Single Judge of this Court in a petition filed under Article 226 of the Constitution of India challenging excess bill, while interpreting section 7-B of the said Act, has observed that section 7-B of the Act has to be widely construed. Section 7-B, like any arbitration clause, provides that if any dispute concerning any telegraph authority and the person for whose benefit the line, appliance or apparatus is or has been provided, the dispute would be determined by arbitration. A dispute with regard to the recording of the calls would necessarily fall within the ambit of section 7-B of the said Act. According to the Division Bench, the learned Single Judge was, therefore, right in coming to the conclusion that an adequate alternative remedy under the said Act by way of arbitration was available. In fact, due to existence of section 7B, even the jurisdiction of the Civil Court under section 9 of the Civil Procedure Code would be regarded as impliedly ousted. Therefore, even a civil suit challenging the correctness of the bills so raised would

not be maintainable in a Civil Court. However, while considering the decision of the Allahabad High Court in the case of Raghubar Dayal Kanodia vs Union of India & ors AIR 1970, Allahabad,143, the Division Bench has observed that:

"It is no doubt true that the learned Judge of the Allahabad High Court, in the case of Raghubar Dayal (supra), came to the conclusion that the said Section 7B was not applicable, but the grievance in that case was not with regard to the alleged defect in the meter recording the number of the calls which have been made, but the grievance was that reading was not correctly recorded. It was with regard to this grievance that the learned Judge observed that Section 7-B of the said Act has no application. "

In this case, we are not concerned with the grievance of defect in the meter recording the number of the calls made. In this case, we are concerned with a suit for a declaration praying that the department was not entitled to disconnect one telephone for the alleged non-payment of bills of another telephone of the same subscriber and for re-installation thereof. The question which arises for consideration in this case is, whether it was open to the respondents to raise the question of maintainability of the suit on account of the arbitration provision for the first time in this appeal, especially when the said contention was not raised in the written statement and consequently no issue with regard to the maintainability of the suit could be framed by the learned City Civil Judge and allowed the learned Judge to proceed further with the suit. It is to be noted that vide Ex.38, the appellants addressed a registered notice dated 20th February 1990 to the respondents immediately after the second telephone was disconnected on 15th February 1990. The respondents, at that time, ought to have considered the dispute and referred the same to the arbitrator. However, surprisingly, the respondents did not even reply to the notice of the appellants. In view of the conduct on the part of the respondents by participating in the suit proceedings and not raising any objection regarding the maintainability of the suit at the very inception, it may amount to submitting to the jurisdiction of the Civil Court for the purpose of adjudication of the merits of the controversy in the suit. If at all an objection was raised in view of the availability of the remedy under section 7B of the Act, the Civil Court could have referred the matter to the Arbitrator. Having not done so and having allowed the Civil Court to proceed further

with the suit and after after dismissal of the suit, raising of the said dispute in the arguments in appeal preferred by the appellant-plaintiffs should be discarded as an argument for convenience. Apart from that Section 7-B contemplates reference to arbitration in the event of a dispute and such a reference must precede the disconnection and not follow it. This is particularly so in view of the fact that once the telephone is disconnected, there remains very little practical purpose to be served by remitting the dispute to arbitration under section 7-B. The disconnection during the period of arbitration would result in and is sufficient to cause irreparable injury to a subscriber, who may need the telephone for his business, or for his profession, or for his own personal needs. Therefore, such an action would tantamount to violating the provisions of section 7B of the said Act. Thus, considering the facts and circumstances of the case, I am of the opinion that the contention of the respondents regarding the maintainability of the suit itself is not sustainable and is, therefore, rejected.

Reverting back to the merits of the case, the only question which is required to be decided is as to whether T.No.811585 was in fact reconnected by the respondents and whether the respondents were justified in disconnecting T.No.374398 for the non-payment of telephone bill of T.No.811585 (812101) by invoking the provisions of Rule 443 of the said Rules. Rule 443 of the said Rules provides for default in payment and it reads as under:

"443. Default of payment - If, on or before the due date, the rent or other charges in respect of the telephone service provided are not paid by the subscriber in accordance with these rules, or bills for charges in respect of calls (local and trunk or phonograms or other dues from the subscriber are not duly paid by him, any telephone or telephones or any telex service rented by him may be disconnected without notice. The telephones or the telex so disconnected may, if the Telegraph Authority thinks fit, be restored if the defaulting subscriber pays the outstanding dues and the reconnection fee together with the rental for such portion of the intervening period (during which the telephone or telex remains disconnected) as may be prescribed by the Telegraph Authority from time to time. The subscriber shall pay all the above charges within such period as may be prescribed by the

Telegraph Authority from time to time."

The Division Bench of this Court in M/s Arun Paper Products, Ahmedabad vs Union of India 1989 (1) 38 G.L.R.51 has, while interpreting Rule 443, held that rule 443 empowers the department to disconnect the telephone belonging to a subscriber even if rent in respect of that telephone is not due, provided the rent in respect of any other telephone is due. According to the Division Bench, Rule 421 of the Rules applies where a telephone is provided for a fixed term. In that case, the notice is necessary. However, where the case falls under rule 443 and a demand has been made and the rent is in arrears, the telephone can be disconnected and the principles of natural justice cannot be invoked. The Division Bench took the said view on the facts before it inasmuch as all the requirements necessary to give a notice to the appellants were complied with and there were admitted arrears of the telephones stood in the name of the person who was disputing the change of the place in respect of one phone. Here is a quite different case wherein the controversy between the parties relates to the question of disconnection, restoration and arrears with particular reference to the absence of evidence on the part of the department to prove that the bills of arrears were in fact sent to the appellants. It is the specific case of the appellant No.2, who is examined at Ex.13, that T.No. 811585 was disconnected for non-payment of the dues. He has admitted that on 18-5-1987 the department had sent advice note but T.No.811585 was never restored and that he had not received any periodical bills thereafter. According to him, on 12-2-1990, he was informed on his residential phone No.347398 regarding non-payment of bill of T.No.812101 by the department to which he had stated that the said telephone number does not belong to him, and that he has not received any bill. Appellant No.2 has maintained that old telephone No.811585, which was dead, had not been restored. Appellant No.2 also met the Accounts Officer of the respondents on 17-2-1990 at his office and made a grievance that his residential telephone No.347398 was disconnected without any notice. In view of this evidence, it was for the respondent-department to show that the phone at the factory being No.811585, which was renumbered as 812101, was reconnected and continued till 6-1-1989 and they had already issued bills dated 1-11-1988 and 11-12-1988 for Rs. 3156/- and Rs.302/-, respectively. Thus the burden of proving these facts was heavily on the respondent department as the entire operation of the telephon system, including lines, metering, circuits, instrument,

operation of the hook, switch or functioning of its employees and the like were within the full control of the department alone. The subscriber is totally unaware about the workings of the telephon system and he had no access to get details to prove his own case.

It is true that in the instant case the respondents have tried to prove the case against the appellants by way of producing oral as well as documentary evidence. Mr. H.V. Shaikh, who was working as Junior Accounts Officer, has been examined at Ex.39. He has stated that the original factory phone No.811585 was disconnected firstly on 21-3-1985 for non-payment of dues and the same was thereafter permanently disconnected on 20-1-1987. As the appellants had applied for reconnection, the said telephone was reconnected on 2-6-87 with the new number 812101. According to this witness, the telephone instrument of T.No.811585 was not recovered and the same remained with the appellants till 6-2-1989 when it was again disconnected for non-payment of the dues. He has produced the supplementary and duplicate bills at Exs.35 and 36 for T.No.812101. This witness has identified Ex.37 being a copy of the meter reading. According to this witness, before disconnecting the residential telephone 347398 of the appellants, the appellants were informed on 1-2-1990 and which information was received by one Jayeshbhai Patel on behalf of the appellants. This witness in his cross-examination has admitted that the first supplementary bill of T.no.811585 (812101) was prepared on 1-11-1988, which was restored on 2-6-87. He has further admitted that unless the arrears for the bills are cleared, no telephone can be restored. This witness has also admitted that when the factory phone was disconnected on 6-2-89, appellant No.2 was informed through his workman. However, he was not informed by any written notice or letter.

One more witness on behalf of the department is Ramesh Motwani, who has been examined at Ex.41. He was working as Sub-Divisional Engineer, N.D.F.Naroda Telephone Exchange. He has stated that T.No.812101 was restored on 2-6-87 as per the Advice Note and the same was disconnected on 21-2-90. Reading the evidence of both these witnesses, it is clear that both the witnesses had no personal knowledge about the present case and they deposed before the Court on the basis of the record. There is inconsistency in their evidence regarding disconnection of T.No.812101 as Mr. Shaikh, in his evidence, has stated that it was disconnected on 6-2-89 whereas Mr. Motwani has stated that the same was

disconnected on 21-3-1990.

The documents on which the respondents have placed reliance are on record at Exs.34 to 37. Ex.34 is the Advice Note dated 18-5-87 to reinstall T.No. 811585. On the basis of the said document, it was contended that T.No.811585 was in fact reinstalled or restored. Perusing the said document, it appears that no reliance can be placed on the same. Document Ex.34 is absolutely vague and general. Nobody was examined by the respondents to prove that on the basis of Ex.34 T.No.811585 was in fact reinstalled. The department could very well have examined an officer who attested the said document Ex.34, but no attempt was made for the same. Unfortunately, there is nothing on record to show that in compliance with Ex.34, the telephone in question was reinstalled as there is no compliance report to that effect. In fact Ex.34 contemplates various columns showing details of the work carried out which include the work done by a particular Inspector/Engineer on a particular date but nothing further is stated and in fact all the columns have remained blank.

Ex.35 is the supplementary bill dated 1-11-1988 alleged to have been issued by the respondents to the appellants. The opening meter reading shown in column No.1 is 29550 which is not in conformity with Ex.34 wherein it is shown to be 28906. It is the case of the respondents that vide Advice Note Ex.34, T.No. 811585 was reconnected with effect from 18-5-87, but bill Ex.35 is dated 1-11-1988 meaning thereby the same had been issued after about 17 months. This raises a doubt regarding the genuineness of the bill and the veracity of the statement that it was in fact issued to the appellants. The long delay on the part of the respondents raises a further doubt regarding the actual installation of the telephone in question. It is a matter of common knowledge that the subscriber would get bills at an interval of every two months or at the most after three months. However, the period of 17 months is not a small period during which the department waited to receive for the outstanding dues, if there were any, and permitted the appellants to use the telephone. It is to be noted that on previous occasion also this very telephone was disconnected and on making payment of the dues it was reinstalled. Therefore, it can be presumed that the department was very vigilant in recovering its dues at every scheduled interval and in any case they could not have waited for a period of 17 months. Ex.36 is also a copy of the bill dated 11-12-1988 which is also a disputed bill like Ex.35 and the same reasoning would

apply to this bill.

Then comes Ex.37, which is a statement of the local calls for the period between 2-6-87 and 6-2-89 for the telephone in question. Surprisingly this is on a piece of paper with the signature and rubber stamp of the officer of the respondent. This document is required to be discarded on the ground that thereon no telephone number, no exchange number, nor the name of the person who prepared this statement have been stated. The method of arriving at the figures stated in the statement has not been furnished by the respondents. Nothing has been produced to show that it was copied out from the original. Even the original is also not produced. Even the statement showing the calls is also not correct. Mr. Shaikh, Ex.39, has stated in his evidence that telephone meter was recorded every fortnightly but this meter reading was not recorded accordingly. The learned City Civil Judge unfortunately has totally overlooked the provisions of sections 62 and 65 of the Evidence Act which deal with the secondary evidence. The learned Judge has exhibited the documents in question even though they have not come from the proper custody and even though the original documents have not been produced. In absence of the original documents on record, no foundation can be laid for the admissibility of the secondary evidence. In any case, the documents in question are copies of the originals and, therefore, they are not admissible in evidence. The Division Bench of this Court in Patel Maganbhai Bapujibhai and ors vs Patel Ishwarbhai Motibhai and ors AIR 1984 Gujarat 69 has laid down that where the document tendered in evidence was a hand-written copy of the original issued as true copy under the signature of the concerned officer, the same would not be admissible in evidence under S.63(2) when it was not stated that it was a copy made from the original by mechanical process or copy compared with such copy. In such a case sub-section (3) of section 63 also could not be pressed into service for admission of the copy in question as secondary evidence of the original. In view of this, Ex.34, which is the Advice Note for reinstallation of T.No.811585 and Ex.37 which is the statement of the reading of the local calls for the said telephone are required to be taken out of the consideration on the ground that they are being secondary evidence not proved in accordance with the law.

In view of the above, the respondents have failed to establish that T.No.811585 was in fact reinstalled on 18-5-1987. It is interesting to note that Ex.29 is a bill issued by the respondents. It is dated 11-6-1992

for an amount of Rs.4763 which includes the bill amounts of Rs.3156/- and Rs.302 alleged to have not been paid by the appellants. Now, it is the specific case of the respondents that T.No. 812101 was disconnected on 6-2-1989. The respondents could, therefore, not have issued this bill Ex.29 in 1992 in the name of the first appellant. Even otherwise, when the telephone was disconnected on 6-2-1989, there was no question of recording further calls alleged to have been made by the appellants after the said date. Thus, the possibility of restoring this very telephone for another party by the department cannot be ruled out. The fact that the appellants were not served with bills for a period of 17 months read with the bill Ex.29 would suggest that the telephone in question was not at all reinstalled at the factory of the appellants. This is further clear from the evidence of Mr. Shaikh at Ex.39 that even though the disputed bills dated 11-12-1988 and 11-2-1989 were sent by registered letter, registered A/D slip has not been produced. The claim of the respondents that the appellants were informed about the disconnection of T.No. 812101 through his workman appears to be an after thought and is not believable. In view of the inconsistency in the evidence regarding disconnection of T.No.812101 by the two witnesses examined on behalf of the respondents wherein one has stated that it was disconnected on 6-2-89 and the other has stated that it was disconnected on 21-3-90, it can be inferred that the telephone in question was not at all installed and even if it was installed, the same was continued to be used by person other than the appellants, which is evidence from bill Ex.29.

The net result of the aforesaid discussion is that T.No. 811585 (812101) was not restored at all by the respondents on 2-6-87 as claimed by the respondents and therefore the appellants are not liable to pay the amount of arrears claimed vide bills Exs.35 and 36. Consequently on the ground of arrears, for non-payment of the said arrears, the respondents were not entitled to disconnect the residential T.No.347398. Therefore, the appellant-plaintiffs are entitled to the restoration of T.No.811585 (812101) and 347398. Mr. Trivedi, party in person, has stated that the possession of the factory, which was running on lease has been handed over to the lessor on expiry of the lease period. Therefore, he requests that T.No.811585 (812101) may be ordered to be transferred and shifted to his residence. In view of the fact that the appellants are succeeding in this appeal, there will not be any difficulty in acceding to his request.

In the result, this appeal is allowed with costs.
The judgment and order passed by the learned City Civil Judge, Court No.22, Ahmedabad in Civil Suit No. 1969/90 is set aside and it is declared that the deisconnection of T.Nos.811585 (812101) and 347398 allotted to the appellant-plaintiffs was illegal, arbitrary and bad in law and the respondent-defendants are directed to reconnect the said two telephones at the residence of appellant-plaintiff No.2 within four weeks from to-day.

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